89-1642

No.

In The
Supreme Court of the United States
October Term, 1989

UNITED TRANSPORTATION UNION,
Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

GORDON P. MacDOUGALL
1025 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 223-9738
Attorney for Petitioner

April 1990

CASILLAS PRESS, INC. – 1717 K STREET NW WASHINGTON DC 20036 – 223-1220

QUESTION PRESENTED

Whether a railroad employees' union has standing to seek review of the Interstate Commerce Commission's exemption of persons from the statutory requirements to serve as officers or directors for more than one railroad.

LIST OF PARTIES

The following parties appeared in the proceedings before the court of appeals below:

Patrick W. Simmons (United Transportation Union)
Association of American Railroads
Interstate Commerce Commission
United States of America

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Cases: Page

Page

Statutes:

Statues-at-Large

Public Law:

Page

Regulations:

Federal Register:

Treatises:

In The

Supreme Court of the United States

No.

UNITED TRANSPORTATION UNION,
Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, United Transportation Union ("UTU"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in this proceeding.

OPINIONS BELOW

The opinion of the court of appeals (App. A, 1a-25a) is reported at 891 F.2d 908.

The decision of the Interstate Commerce Commission (ICC) (App. D, 29a-44a) is reported at *Exemption-Certain Interlocking Directorates*, 5 I.C.C.2d 7 (1988).

JURISDICTION

The opinion of the court of appeals was entered November 28, 1989 (App. A, 1a). The Judgment of the court of appeals was entered November 28, 1989 (App. B, 26a-27a). UTU timely filed a petition for rehearing, which was denied January 22, 1990 (App. C, 28a).

The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1). See also 28 U.S.C. 2101(c), 2350(a).

STATUTE INVOLVED

The statute primarily involved is the rail carrier interlocking directorate provision, which is administered by the ICC in 49 U.S.C. 11322(a):

> A person may hold the position of officer or director of more than one carrier as defined in section 11301(a)(1) of this title only when authorized by the Interstate Commerce Commission. The Commission may authorize a person to hold the position of officer or director of more than one of those carriers when public or private interests will not be adversely affected.

STATEMENT OF THE CASE

1. The Prohibition of Interlocking Directorates Without Prior ICC Approval.

Section 8 of the Clayton Act, 15 U.S.C. 19, prohibits interlocking directorates between corporations under certain circumstances but, by its very terms, does not apply to interlocks between common carriers. The U.S. House in 1914 passed a separate bill dealing with railroad interlocking directorates,

but it did not become part of the Clayton Act of 1914; instead, its terms were substantially adopted later in section 20a(12) of the Interstate Commerce Act, 49 U.S.C. 20a(12), as part of Transportation Act of 1920. 41 Stat. 496. Section 20a(12) was recodified in 1978 to its present 49 U.S.C. 11322(a).[1] 92 Stat. 1433.

Section 11322(a) permits a person to serve as an officer or director of more than one carrier only with prior ICC approval. The ICC may authorize a person to hold the position of officer or director of more than one carrier "when public or private interests will not be adversely affected."

The standard of "public or private interests will not be adversely affected" extends beyond competitive considerations. The ICC recited the background to the 1920 enactment of former section 20a(12) in *Chesapeake & O. Ry. Co. Purchase*, 271 I.C.C. 5, 20 (1948),[2] as directed to the financial wrecking of railroads. 271 I.C.C. at 20:

> In our Thirty-Third Annual Report (1919), at page 5, in recommending legislative consideration of certain suggestions we stated:
>
> > The records in investigations made and reported upon by us in cases of financial wrecking of railroad companies suggests the advisability of extending the terms of the Clayton Act with reference to common or interlocking directors so as to render them applicable to common carrier corporations,

---

[1]The penalties provision for violation of section 20a(12) were recodified at 49 U.S. 11911(b). Prohibited conduct for officers and directors, generally, were recodified at 49 U.S.C. 11322(b).

[2]This was the well-publicized attempt by the late Robert R. Young to hold positions on two rail carriers, which the I.C.C. denied. *See:* Borkin, Joseph, *Robert R. Young - The Populist of Wall Street*, 94-131 (Harper & Row, 1969).

> *even when they are not competitive* (italics supplied in original).

The ICC approved the vast majority of applications for permission to hold interlocking directorates. Sharfman, I.L., *The Interstate Commerce Commission*, Vol. I, p. 194 n.35 (1931):

> ". . . of the hundreds of applications disposed of by the Commission only a handful have been denied."

The ICC stated in its annual reports for the years 1921-29 that the effect of the statute cannot be measured by the number of denials, for the law has exercised a controlling effect in the selection of individuals for positions. *Sharfman, supra* at 194:

> "The effect of the statute cannot be measured by the number of cases in which we have refused to grant authority. It may be asumed that in many instances the law has exercised a controlling influence in the selection of individuals for positions with carriers having conflicting interests. Comparatively few applications for authority to serve such carriers have been filed with us."

See also *Sharfman*, Vol. IIIA, at 388-404.

2. The ICC Exempts Persons From the Interlocking Directorates Provisions Except Where Two Class I Railroads are Involved.

The ICC, *sua sponte*, on April 13, 1988, instituted a rulemaking proceeding to exempt persons from the interlocking directorate provisions of Section 11322(a), so long as the person did not serve on two Class I rail carriers. (App. E, 45a-53a). The ICC gave as its reason the recent proliferation of short line railroads, particularly by non-carriers. (App. E, 46a):

> Our review of interlocking directorate regulation has been prompted by the recent proliferation of short line railraods, especially those created by non-transportation companies to serve primarily their own traffic. In connection with the start-up of these new lines, the new operators often obtain additional railroad industry expertise by their choice of officers and directors. These indiviudals may be holding similar positions on other carriers. Thus, regulatory authorization is required.

The ICC's exemption proceeding was instituted pursuant to 49 U.S.C. 10505, which permits the ICC to exempt persons from statutory requirements if regulation is not necessary to carry out the rail transportation policy (49 U.S.C. 10101a), and the transaction is either of limited scope or that regulation is unnecessary to protect shippers from market abuse. Cf. *Illinois Commerce Com'n* v. *I.C.C.*, 819 F.2d 311 (D.C. Cir. 1987); *Brae Corp.* v. *United States*, 740 F.2d 1023 (D.C. Cir. 1984), *cert. den.* 471 U.S. 1069; *Coal Exporters Ass'n of U.S. v. United States*, 745 F.2d 76 (D.C. Cir. 1984), *cert. den.* 471 U.S. 1072.

Four comments were filed: UTU, Association of American Railroads (AAR), American Short Line Railroad Association (ASLRA), and Sergeant W. Wise.[3] The ICC approved the exemption, by a sharply divided 3-to-2 vote, *Exemption-Certain Interlocking Directorates*, 5 I.C.C.2d 7 (1988) (App. D, 29a-44a).

The ICC found the proposed exemption met the requirements of 49 U.S.C. 10505. The agency stated that the reasons behind the 1920 enactment of the interlocking directorates are

---

[3]Counsel for several undisclosed short line railroads in Western New York. 5 I.C.C.2d at 7. (App. D, 29a-30a).

no longer valid, particularly where the exemption is not being expanded to cover class I railroads. 5 I.C.C.2d at 12 (App. D, 37a):

> As we stated in our previous decision, the reasons behind the 1920 enactment of the interlocking directorate prior approval provisions are no longer valid especially where, as here, exemption is not being expanded to cover class I railroads. Given the relative smallness in size of class II and class III railroads and the overall competition present in the transportation industry, the impact of such linkage would be insubstantial, and it would be highly unlikely for any linkage to succeed in allowing one carrier to dominate or influence the other carrier contrary to the other rail carrier's or shipper's interests.

The ICC claimed that Staggers Rail Act of 1980 mandated the rail industry to operate as other industries, except where government regulation is necessary. 5 I.C.C.2d at 9 (App. D, 32a):

> In the Staggers Rail Act of 1980, (Staggers Rail Act), Pub. L. No. 96-448, 94 Stat. 1895 (1980), Congress mandated that the railroad industry be allowed to operate as other industries, except where government regulation was shown to be necessary.

Commissioner Lamboley dissented in part, saying the exemption should not include interlocking directorates involving a class I carrier, referring to questionable "tie-in" arrangements evident in certain short-line transactions, 5 I.C.C.2d at 15 (App. D, 41a-42a); Commissioner Simmons dissented on the ground the existing procedures are simple and can be expeditious, and that the ICC's oversight serves a useful purpose. 5 I.C.C.2d at 15. (App. D, 42a).

3. The Court of Appeals Dismisses for Lack of Standing.

The petition to review the ICC's exemption decision was brought by Patrick W. Simmons, who serves as Illinois Legislative Director for UTU, and who had participated in that capacity in the ICC's proceedings. 5 I.C.C.2d at 7 (App. D, 30a). The Government and intervenor AAR, in their briefs, sought dismissal for lack of standing, and the Court dismissed the petition for lack of standing, after first changing the name of the case from Simmons to UTU. (App. A, 2a n.1).[4] One judge would have denied the petition for review, rather than dismiss the petition for review. (App. A, 22a-25a).

The court of appeals found that any injury in fact to a railroad worker, or to UTU, from exempting interlocking directorates is "fatally speculative" and therefore does not suffice to confer standing. (App. A, 10a). Moreover, the court below opined that it is speculative whether decreased competition in the railroad industry will harm rather than help UTU members. (App. A, 12a). The reasoning of the court of appeals was predicated upon anticompetitive behavior or bankruptcy as the cause for UTU's concern. (App. A, 10a, 12a).

The court of appeals added that UTU offered no reason to support the proposition that an interlocking directorate involving a class II or class III railroad will damage a carrier (App. A, 11a), and that the ICC retains the power to revoke any threatening interlocking directorate. (App. A, 11a n.11).

---

[4]UTU considers the panel's action in changing the name of the petitioner to be most unusual. Many judicial actions are brought in the name of an involved UTU state director, who has his own dues assessment. The UTU, and some other labor organizations are not monolithic in the same sense as a corporation. Moreover, one must be a party to the agency proceeding to institute judicial review, so that changing names may cause problems. *Simmons v. I.C.C.*, 716 F.2d 40 (D.C. Cir. 1983).

The court of appeals remarked that since the ICC has not rejected any interlocking directorate covered by the rule in nearly twenty years (App. A, 12a),[5] the prior approval procedure seems to have been primarily a nuisance, and thus any links formed under the exemption are not likely to be any more of a subterfuge for collusive behavior than without the exemption.

Thus the court of appeals concluded that it is highly unlikely petitioner will sustain any injury at all; and unlikely any injury could be traced to the ICC's exemption; and that any future injury could occur even in the absence of the new rule. (App. A, 13a).

The opinion next considered the Congressional purpose in passing section 11322(a), but found that an explicit or implicit legislative prediction of harm can never be "reviewed" by the Courts, since Article III standing questions involve separation of powers. In short, the Court must determine whether the causal nexus is firm. The court of appeals said it need not defer to a rational congressional assessment of harm because even though it might well have been rational when made in 1914, it is too far out of date to serve as a basis for UTU's standing. (App. A, 14a-17a).

The court's examination of the 1914 U.S. House bill revealed that Congress was only briefly concerned with interlocking railroad directorates, and that there was no substantive discussion of the interlocking directorate problem or the expected effect in the 1920 legislative history. (App. A, 17a-19a).

---

[5]This claim appears derived from AAR's research that the ICC has not disapproved a proposed interlocking arrangement between railroads in a *reported* decision for almost 20 years. 5 I.C.C.2d at 11 n.6 (App. D, 35a n.6). However, ICC ***unreported*** decisions vastly outnumber those which are ***reported***.

Finally, the court of appeals addressed the contention that the ICC's failure to provide a notice procedure for invoking the individual interlock exemption might create standing. (App. A, 20a-21a). The court held that since it did not believe there is any likelihood that interlocking directorates will harm railroad workers, there is no reason to allow UTU to sue on the theory that the exemption has made it more difficult to challenge a given directorate in the future. (App. A, 21).[6]

Judge Ginsburg (R.B.) concurred in denying the petition for review, stating that the case is simple, and should be resolved on the basis of the statement, taken from the court's opinion, that petitioner has shown no cause to credit the proposition that an interlocking directorate involving a class II or class III railroad will damage or lead to the financial ruin of a carrier. (App. A, 22a). Judge Ginsburg relied upon the small market share held by class II and class III railroads. (App. A, 22a).

Judge Ginsburg said she would apply to standing analysis the axiom that legislative judgments on social and economic issues enjoy a strong presumption of constitutionality. (App. A, 24a-25a).

REASONS FOR GRANTING THE WRIT

The question presented for review is important. The ruling by the court of appeals that railroad employees, although participating in an ICC proceeding, may not seek review of the ICC's interlocking directorate decision, is an important matter of federal law which should be settled by this Court.

---

[6]A notice is required to invoke the class abandonment exemption, 49 CFR 1152.50; the non-carrier acquisition of lines, 49 CFR 1150.31; the operation of State acquired lines, 49 CFR 1150.51; operation by designated operators, 49 CFR 1150.11; and the 7 categories for transactions between rail carriers under 49 U.S.C. 11343, 49 CFR 1180.2(d).

I. THE CURRENT CONTROVERSY OVER STANDING AND THE SEPARATION OF POWERS SHOULD NOT EXTEND TO JUDICIAL REVIEW OF ACTION OF AN INDEPENDENT AGENCY.

There is a lively controversy over the extent to which "standing" to institute an action involves the separation of powers between the coordinate branches of Government. See: Scalia, Antonin, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881 (1983).[7] However, whether the "full time public interest law firm," should generate litigation against an executive branch agency (*Ibid.* 893) without a showing of "concrete injury" (*ibid.* 894-95), is entirely different from the situation where, as here, the duly-designated collective bargaining agent for a union in the heavily regulated railroad industry seeks judicial review of action taken by the ICC.

The ICC is an independent agency of the Congress. It is not beholden to the Executive Branch. Judicial review of ICC action is necessary to protect the effective jurisdiction of the U.S. Congress in the constitutional scheme. An administrator in the Executive Branch is subject to the immediate powers of the President, but an independent agency that goes awry is subject to a delayed remedial process requiring action by both the Congressional and Executive branches, absent timely judicial intervention at the behest of a party with standing.

The court of appeals states that decisions about Article III standing are decisions about the constitutional boundaries (App. A, 14a), and this is correct. However, when dealing with the findings of Congress, as administered by an independent agen-

---

[7]The Federalist Society for Law and Public Policy Studies conducted a major meeting on this subject, held January 19-20, 1990 in Washington, DC. For a divergent view, see: Nichol, Gene R., *Abusing Standing*, 133 U. Pa. L. Rev. 635 (1985).

cy, there should be active judicial review. See the separate expression of Judge Ginsburg. (App. A, 22a-25a).

II. RAILROAD LABOR ORGANIZATIONS ARE ACTIVE PARTICIPANTS IN THE ICC'S REGULATORY PROCESS, AND HAVE STANDING FOR JUDICIAL REVIEW.

The railroad industry long has been the subject of governmental regulation. *Pittsburgh & Lake Erie R. Co. v. R.L.E.A.*, 109 S.Ct. 2584, 2599 (Stevens, 1989). Railway employee organizations are very active in ICC proceedings, and in judicial review thereof, as this Court well knows. *P&LE, supra; ICC v. Locomotiove Engineers*, 482 U.S. 270 (1987). Indeed, the ICC's motivation for the instant interlocking directorate exemption, non-carrier acquisition of rail properties (App. E, 46a), was the subject of *P&LE, supra*.

There are three statutory provisions directly dealing with rail employee interests in ICC proceedings involving interlocking directorates. In addition, judicial review is contemplated.

1. *Section 10328(a)*. Congress has determined that the interests of carrier employees should be heard in every ICC proceeding and judicial review thereof if their representatives desire to intervene. 49 U.S.C. 10328(a). This statutory right of intervention has been confirmed. *Railroad Trainmen v. B. & O. R. Co.*, 331 U.S. 519 (1947). While such absolute right of intervention does not confer Article III standing to invoke judicial power, it does indicate that in the scheme of things Congress desires that the voice of railroad employees should be heard.

2. *Section 11322(a)*. The statutory test for ICC approval of an interlocking directorate is whether "public or private" interests will not be adversely affected. The interest of railroad

employees certainly comes within the term "private interest" and indicates the Congressional concern that employee impacts be embraced within the ICC's process.

3. *Section 10101a.* The rail transportation policy, 49 U.S.C. 10101a, directs the ICC to encourage fair wages and safe and suitable working conditions in the railroad industry. 49 U.S.C. 10101a(12). The provisions of the rail transportation policy are carried over into the exemption process by direct reference in 49 U.S.C. 10505(a)(1).

4. *Judicial Review.* Judicial review of ICC action is provided by the so-called Hobbs Act, 28 U.S.C. 2341, *et seq.* There is a presumption in favor of judicial review. *Abbott Laboratories v. Gardner,* 387 U.S. 136, 140 (1967); *City of Chicago v. United States,* 396 U.S. 162, 164 (1969).

III. THE DECISION BELOW USURPS CONGRESSIONAL POWER TO CONFER STANDING TO SUE.

The court of appeals' opinion characterizes rail employee injury from interlocking directorates as "fatally speculative" (App. A, 10a), "wholly speculative" (App. A, 12a), "unadorned speculation," (App. A, 13a), and "utter speculativeness," (App. A, 21a). But Congress has made a determination that there is injury from interlocking directorates. Indeed, the court's opinion goes on to say that Congress did not correctly perceive the danger in 1914, and the Congessional findings are out of date in any event. (App. A, 14a-19a).

The court of appeals has usurped Congressional enactments with its own view of interlocking directorate prohibitions. The subject of interlocking directorates is important to the nation's antitrust laws. The decision as to the wisdom of the antitrust laws is for Congress.

1. *The Factual Finding.* The court of appeals, and the separate expression of Judge Ginsburg, rest upon a factual finding that "there is no no reason . . . to credit the proposition that an interlocking directorate involving a class II or class III railroad will damage" . . . or "lead to the financial ruin of a carrrier." (App. A, 11a, 22a).

The court of appeals' opinion and that of Judge Ginsburg are simply incorrect in their ***de minimus*** finding, for the heart of the ICC's exemption goes to the involvement with a class I carrier. The exemption applies to interlocks between a class I carrier, and a class II or class III carrier. It is precisely this relationship with a class I carrier that formed the basis for the dissent by Commissioner Lamboley, who would have precluded the exemption where a class I carrier is involved. 5 I.C.C.2d at 15 (App. D, 41a-42a):

> I would not extend this class exemption to include interlocking directorates between and involving Class I and Class II or III carriers. In my view, there is no business justification in this record or in Commission experience to warrant such exemption of Class I carrier participation in Class II or III operations. Indeed, questionable "tie-in" arrangements evident in certain short line transactions (fn. omitted) strongly suggest there are sound public policy and competitive reasons for not doing so at the corporate board level.

The exemption is inapplicable only where *two* or more class I carriers are involved, as the court of appeals' opinion seemed to recognize at the outset. (App. A, 4a). The opinion does not indicate the size characteristics of the rail classifications, other than to state that the 16 class 1 railroads operate approximately 82 percent of the track, employ 90 percent of the labor force, and earn 92 percent of the revenues, and that there

are 484 class II and class III railroads. (App. A, 4a). However, the interlocks between these 16 carriers and the 484 class II and III carriers are exempted by the ICC's order,[8] contrary to the inference of the court's opinion, and contrary to the understanding of the court's opinion by Judge Ginsburg.

It is obvious that the "speculative" findings of the court's opinion are contrary to any rational reading of the ICC's decision and the briefs of the parties.

2. *Legislative History.* The court of appeals based its analysis of legislative history from the 1914 House proceedings. (App. A, 17a-19a). The opinion acknowledges that section 11322(a) was not enacted until Congress passed Transportation Act of 1920, but asserts the 1920 legislative history contains no substantive discussion of the interlocking directorate problem or the expected effect of section 11322(a). (App. A, 12a n.).

The court of appeals has overlooked the 1920 legislative history, amply cited by the parties below. See discussion, with verbatim quotations, by the ICC in *Chesapeake & O. Ry. Co. Purchase,* 271 I.C.C. 5, 18-21 (1948). See, in particular, discussion between Congressman Rayburn and ICC Commissioner Clark, and the ICC's 1919 recommendation to the Congress. 271 I.C.C. at 20-21.

---

[8]A class I rail carrier has revenue in excess of $92.0 million annually. A class II carrier's revenue exceeds $18.4 million, and a class III carrier has revenue under $18.4 million. These are 1988 figures, and are adjusted annually for inflation. 49 CFR 1201(1-1)(a)-(c) (1988ed.). For 1988 inflation factor, *see:* 54 *Fed. Reg.* 8407 (Feb. 28, 1989). This matter is of record. (AAR Br., 2 n.1).

IV. THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT HAS PERMITTED UTU TO SUE THE ICC OVER INTERLOCKING DIRECTORATES IN THE PAST.

The U.S. Court of Appeals passed upon the validity of the ICC's interlocking directorate regulations for designated rail operators, on petition for review instituted by the UTU's Illinois Legislative Director. The question of standing was not raised. *McGinness v. I.C.C.*, 662 F.2d 853 (D.C. Cir. 1981).

The only new element today appears to be an activist campaign to deny standing on "separaton of powers" grounds, *supra* p. 10, n. 7.

V. UTU SUFFERS THE REQUISITE INJURY AND OTHERWISE HAS THE REQUISITE STANDING.

Section 11322(a) is not solely concerned with anticompetitive behavior between carriers, contrary to the prime thrust of the court of appeals' opinion. The purpose of 49 U.S.C. 11322(a) is to assist in the prevention of "cases of financial wrecking of railroad companies," as requested by the ICC in its 1919 Annual Report to the Congress, recited in *Chesapeake & O.Ry. Co. Purchase*, 271 I.C.C. 5, 20 (1948). Railroad employees are certainly within the "private interests" to be protected by section 11322(a), and meet the requisite zone of interests in this regard. *Clarke v. Securities Industry Assn.*, 479 U.S. 388, 399-400 (1987).

Employees stand to be injured by unauthorized control and manipulation of carriers. The provisions of 49 U.S.C. 11322(a) are one means to prevent such control or manipulation of carriers.

The bankruptcy of Penn Central, Milwaukee Road, and the Rock Island, caused Congress to enact special legislation for

employees adversely affected by the collapse of these railroads.[9]

One of the major problems with the interlocking directorate exemption decision is the lack of knowledge, for a person is not required to file a notice that the exemption is being exercised, unlike the requirements of other ICC class exemptions, *supra* p. [illegible] n. 6. Thus timely application to revoke the exemption is not possible.

Railroad employees suffer injury in fact by the ICC exemption decision, which is fairly traceable to the decision, and the harm will be alleviated if the exemption is set aside by the Courts.

The controversy between UTU and the ICC, the latter supported by the AAR (representing principally the Class I rail carriers) is real.

The court of appeals decision, in ruling that rail employees do not have standing to attack this ICC order, is bound to spread to other situations unless stopped by the U.S. Supreme Court in this proceeding.[10]

---

[9]P.L. 93-236 (1974), Regional Rail Reorganization Act of 1973; P.L. 96-101 (1979), Milwaukee Railroad Restructuring Act of 1979; P.L. 96-254 (1980), Rock Island Railroad Transition and Employee Assistance Act.

[10]Indeed, this is already occurring. *See:* No. 88-3207 (USCA-7th Cir.), *Simmons v. I.C.C.* (April 16, 1990); Nos. 88-3211 & 89-1961 (USCA-7th Cir.); *Simmons v. I.C.C.* (April 16, 1990).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Apeals in this case.

Respectfully submitted,

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington, DC 20036
(202) 223-9739

Attorney for Petitioner

April 23, 1990

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 18, 1989 Decided November 28, 1989

No. 88-1773

UNITED TRANSPORTATION UNION,
PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
RESPONDENTS

ASSOCIATION OF AMERICAN RAILROADS,
INTERVENOR

Petition for Review of an Order of the
Interstate Commerce Commission

Gordon P. MacDougall, for petitioner.

Evelyn G. Kitay, Attorney, Interstate Commerce Commission, with whom *Robert S. Burk,* General Counsel, *Henri F. Rush,* Deputy General Counsel, Interstate Com-

merce Commission, *James R. Rill,* Assistant Attorney General, *Catherine G. O'Sullivan,* Attorney, Department of Justice, were on the joint brief for respondents.

Kenneth P. Kolson and *Dennis W. Wilson* were on the brief for intervenor. *G. Paul Moates, David M. Levy* and *J. Thomas Tidd* also entered appearances for intervenor.

Before: RUTH B. GINSBURG, SILBERMAN and D.H. GINSBURG, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

Opinion concurring in denying the petition for review filed by *Circuit Judge* RUTH B. GINSBURG.

SILBERMAN, *Circuit Judge*: This is a petition brought by the United Transportation Union ("UTU"),[1] seeking review of the Interstate Commerce Commission's ("ICC") decision to adopt a rule that exempts the officers and directors of certain rail carriers from obtaining prior approval for interlocking directorates under 49 U.S.C. § 11322(a). *See Exemption from 49 U.S.C. 11322(a) for Certain Interlocking Directorates,* 5 I.C.C.2d 7 (1988). We hold that the petitioner lacks standing,[2] and therefore dismiss the petition for review.

---

[1]This case was originally brought by Patrick Simmons, the Illinois Legislative Director of the UTU, under his own name. Since Simmons does not even have putative standing as an individual and since subsequent submissions indicate that he actually represents the UTU, we have changed the name of the case.

[2]For a union to have standing to represent its members under *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343 (1977), it must show that (1) union members would otherwise have standing to sue in their own right; (2) that the interests being asserted are germane to the union's purpose; and (3) that individual members' participation is not needed for the claim asserted or for the relief requested. Because we find that no union member would have standing to bring this challenge, we do not discuss the second and third requirements.

I.

In the Staggers Rail Act of 1980,[3] Congress gave the ICC broad responsibilities for deregulating the nation's railroads. One section of that Act, 49 U.S.C. § 10505, directs the ICC to exempt a transaction or class of transactions from regulation when the Commission finds that (1) regulation is not necessary to carry out the 15-factor national rail transportation policy (RTP) articulated in 49 U.S.C. § 10101a;[4] and (2) either (a) the transaction is of limited scope, or (b) regulation is not needed to protect shippers from the abuse of market power. The legislative history of 49 U.S.C. § 10505 indicates that Congress expected the ICC to use its exemption authority to remove "as many as possible of the Commission's restrictions on charges in prices and services by rail carriers . . .

---

[3]Pub. L. No. 96-448, 94 Stat. 1895 (codified at 49 U.S.C. §§ 10101-11917).

[4]Section 10101a provides that:

> In regulating the railroad industry, it is the policy of the United States Government—(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail; (2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required; (3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, . . . (4) to ensure the development . . . of a sound rail transportation system with effective competition among rail carriers and with other modes . . . (5) to foster sound economic conditions in transportation . . . (6) to maintain reasonable rates where there is an absence of effective competition . . . (7) to reduce regulatory barriers to entry into and exit from the industry; (8) to operate . . . facilities . . . without detriment to the public health and safety; (9) to cooperate with the States on transportation matters . . . (10) to encourage honest and efficient management of railroads . . . (11) to require rail carriers . . . to rely on individual rate increases . . . (12) to encourage fair wages and safe . . . working conditions . . . (13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination; (14) to ensure the availability of accurate cost information in regulatory proceedings . . . (15) to encourage and promote energy conservation.

and . . . adopt a policy of reviewing carrier actions after the fact to correct abuses of market power." H. R. REP. No. 1430, 96th Cong., 2d Sess. 105, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 3978, 4110, 4137. *See also Illinois Commerce Comm'n v. ICC*, 848 F.2d 1246, 1249 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 783 (1989).

Pursuant to that congressional direction, the ICC published, in April of 1988, a notice of proposed rulemaking that would exempt all interlocking directorates between two railroads—except those involving two "class I" railroads[5]—from complying with the requirements of 49 U.S.C. § 11322(a). *See Certain Interlocking Directorates; Exemption*, 53 Fed. Reg. 12,443 (1988). Section 11322(a), originally enacted as part of the Transportation Act of 1920, ch. 91, § 439, 41 Stat. 496 (1920), prohibits any person from serving as a director or officer of more than one rail carrier *unless* the ICC has determined that "public or private interests will not be adversely affected."[6] The proposed rule—by replacing the case-by-case approval system with blanket approval—was designed to eliminate the expense and delay accompanying individual applications. Since the ICC had not rejected an application for an interlocking directorate in nearly twenty years and since no decision to approve an application had ever been challenged by any party, the ICC viewed prior approval as

---

[5]The ICC divides the nation's railroads into three classes according to annual operating revenues for three consecutive years. Class I railroads are the largest carriers; there are only 16 of them but collectively they operate approximately 82 percent of the nation's track mileage, employ 90 percent of the railroad labor force and earn 92 percent of the revenues of the rail industry. There are a total of 484 class II and class III railroads.

[6]Section 11322(a) provides in full:

> A person may hold the position of officer or director of more than one carrier as defined in section 11301(a)(1) of this title only when authorized by the Interstate Commerce Commission. The Commission may authorize a person to hold the position of officer or director of more than one of those carriers when public or private interests will not be adversely affected.

unnecessary. After receiving comments on the proposed rule, including those submitted by the petitioner, the Commission adopted the rule. *See Exemption from 49 U.S.C. 11322(a) for Certain Interlocking Directorates*, 5 I.C.C.2d 7 (1988).

In its accompanying explanation, the Commission explained its determination that the rule satisfied the requirements for granting exemptions set out in 49 U.S.C. § 10505(a). It first asserted that the exemption promoted several of the fifteen factors that comprise the national rail transportation policy, finding that the exemption "minimize[s] the need for federal regulatory control and expedite[s] regulatory decisions [49 U.S.C. § 10101a(2)]; ensure[s] continuation of a sound rail system [49 U.S.C. § 10101a(4)]; foster[s] sound economic conditions in transportation [49 U.S.C. § 10101a(5)]; and encourage[s] honest and efficient management [49 U.S.C. § 10101a(10)]." 5 I.C.C.2d at 11. The Commission also agreed with the comments that contended that, by enabling new carriers to recruit talented and experienced personnel from existing carriers, the exemption would reduce barriers to entry in the industry in furtherance of 49 U.S.C. § 10101a(7). Finally, it believed that none of the other policy goals listed in 49 U.S.C. § 10101a would be adversely affected by the rule. *See id.* at 12-13.

The ICC then concluded that the rule satisfied both of the two alternative tests of § 10505(a)(2)—that the exemption is of limited scope and that the prior approval requirements of § 11322(a) are not needed to protect shippers from the abuse of market power. Its scope is "limited" because the exemption will not apply to interlocks between two class I carriers and the substantive provisions of § 11322(b), prohibiting certain actions by interlocking officers and directors, are not affected by the rule. And shippers do not need the protection of § 11322(a), according to the ICC, because the small size of class II and class III railroads and the vigorous competition present in the transportation industry made it "highly unlikely for any linkage to succeed in allowing one

carrier to dominate or influence the other carrier contrary to the other rail carrier's or shipper's interests." 5 I.C.C.2d at 12. The Commission noted that "no shippers chose to file comments" opposing the rule, thereby suggesting that they did not fear any abuse of market power from interlocking directorates. *See id.* at 14.

The petitioner argues that the ICC's decision is inconsistent with § 10505(a) and that it is arbitrary and capricious. The government challenges petitioner's standing on both prudential and constitutional grounds. Our colleague —apparently of the view that the standing issue is too difficult to resolve—believes we should pass on to the merits without deciding whether we have the constitutional authority to hear the case. To be sure, this court has on occasion followed that course, although not often in recent times, but we are unaware of any case where a panel was criticized for *not* employing that technique; in other words, for assuming its constitutional obligation. Here the parties have briefed the standing issue and we have accordingly done our best to answer the jurisdictional question raised. It is hard to understand why, under these circumstances, it could be thought a judicial virtue not to do so.

II.

To satisfy the standing requirements of Article III, a complaining party must "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, ... and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (internal quotes and citations omitted). "The injury alleged must be ... distinct and palpable, ... and not abstract or conjectural or hypothetical." *Allen v. Wright*, 468 U.S. 737, 751 (1984) (internal quotes and citations omitted).

We are mindful that in analyzing standing issues, we "must accept as true all material allegations of the complaint," *Warth v. Seldin*, 422 U.S. 490, 501 (1975). This obligation, at least at first blush, might appear to be in tension with the Court's further admonition that an allegation of injury or of redressability that is too speculative will not "suffice to invoke the federal judicial power." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 44 (1976); *accord Warth*, 422 U.S. at 507. We think this ostensible tension is reconciled by distinguishing allegations of facts, either historical or otherwise demonstrable, from allegations that are really predictions. When considering any chain of allegations for standing purposes, we may reject as overly speculative those links which are predictions of future events (especially future actions to be taken by third parties) and those which predict a future injury that will result from present or ongoing actions—those types of allegations that are not normally susceptible of labelling as "true" or "false." Our authority to reject as speculative allegations of future injuries is well-established. *See Los Angeles v. Lyons*, 461 U.S. 95 (1983); *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Golden v. Zwickler*, 394 U.S. 103 (1969).[7] In *Lyons*, the Supreme Court

---

[7]This principle was recognized by our circuit as least as early as *Harrington v. Bush*, 553 F.2d 190, 208-09 (D.C. Cir. 1977) where the court denied standing to a congressman alleging illegal use of funds by the CIA. In an extensive discussion of the standing issues raised by the complaint, we noted that,

> [t]he harm alleged by appellant . . . would take place, if at all, at some undetermined time in the future . . . . As the time span between challenged activity and the resulting harm to a protected interest increases, it becomes more difficult to maintain the credibility of the specific link between the two. If this linkage cannot be demonstrated, the standing claim must fail even if the underlying injury is judicially cognizable. In this case, the harm that is alleged will take place at such a time in the future so as to render any potential injury 'speculative'. . .

Id. at 208-09 (quoting *Simon*, 426 U.S. at 42-43). In *Harrington*, we thus contemplated that a court could (indeed must) reject predictions of future injury that are unduly speculative.

reviewed the claim of an individual who alleged that he had been injured by an unjustified "chokehold" administered to him by a Los Angeles police officer and that he "justifiably fears that any contact he has with Los Angeles Police officers may result in his being choked and strangled to death..." 461 U.S. at 98. The Court dismissed on Article III grounds the complainant's prayer for an injunction forbidding the use of such chokeholds by police officers, finding it unduly speculative that the complainant "was likely to suffer future injury from the use of the chokeholds by police officers." *Id.* at 105. The Court

---

We do not believe that the court's opinion in *International Ladies' Garment Workers' Union ("ILGWU") v. Donovan*, 722 F.2d 795, 810 (D.C. Cir. 1983), *cert. denied sub nom. Breen v. ILGWU*, 469 U.S. 820 (1984), obliges us always to credit a complainant's predictions of future injury. There, we found standing for a union challenging the Labor Department's decision to repeal regulations that prevented employers from paying homeworkers subminimum wages. In rejecting the claim that it was unduly speculative whether this alleged injury would be *redressed* by the reimposition of regulations on homeworkers' wages, the court described the alleged injury and simply asserted, without elaboration, that "[w]e must accept these allegations as true for purposes of determining standing." *Donovan*, 722 F.2d at 810 (citing *Warth*, 422 U.S. at 502). The allegation that the court accepted as true in that case—that paying subminimum wages to homeworkers will injure factory employees—was not just plausible, it was an application of basic economic logic. Indeed, courts routinely credit analytically identical allegations in garden-variety competitor standing cases. *See, e.g., Clarke v. Securities Industry Ass'n*, 107 S. Ct. 750, 754 (1987); *Investment Company Institute v. Camp*, 401 U.S. 617, 620-21 (1971). The *ILGWU* court was therefore not squarely presented with the problem of whether it must accept allegations of future injury that it finds purely speculative. That a court believes itself bound to credit allegations of future injury that are firmly rooted in the basic laws of economics does not compel us to accept allegations founded solely on the complainant's speculation. Allegations founded on economic principles such as those in *ILGWU* and in competitor standing cases, while perhaps not as reliable as allegations based on the laws of physics, are at least more akin to demonstrable facts than are predictions based only on speculation.

asserted that, "to have a case or controversy with the City that could sustain [his claim for an injunction, the complainant] would have to *credibly* allege that he faced a *realistic* threat from the future application of the City's policy." *Id.* at 106-07 n.7 (emphasis added). On the other hand, we are much less free to reject allegations of existing conditions, of prior or ongoing actions (including intent).[8] In addition, the extent to which we must credit allegations of the cause of injuries that are already sustained is unclear.[9] But if courts were obligated to credit complainants' predictions of *future* events or injuries, both the "redressability" prong and, in cases alleging prospective injury, the "fairly traceable" prong of the standing inquiry—which are, at bottom, predictions of cause and effect—would be reduced to mere pleading requirements.

---

[8]Even with these allegations we apparently retain some discretion to reject those that we find unconvincing. Since the *Lyons* Court characterized as "incredible" the past and present facts that the complainant would have had to allege to have Article III standing—"either (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter, . . . or (2) that the City ordered or authorized police officers to act in such a manner," *id.* at 106 (emphasis in original)—we doubt that the Court thought it would be forced to credit such allegations even if the complainant had made them explicitly.

[9]In *Simon*, for instance, the Court denied standing to low-income citizens and organizations representing them that sought to challenge an IRS rule that they believed prompted hospitals to deny treatment to indigent patients. The Court dismissed the complaint, concluding that the link between the alleged injury and the challenged IRS rule was too speculative and that the injury was not likely to be redressed by a favorable decision. The Court stated that it accepted as true the allegation that the IRS rule "encouraged" hospitals to deny treatment. *See Simon*, 426 U.S. at 42 n.23. Nevertheless, if the Court were truly obligated to accept the complaint's allegations of cause of their asserted injury, it would not have ruled, as it did, that, "[i]t is purely speculative whether the denials of service specified in the complaint fairly can be traced to [the IRS's] 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications." 426 U.S. at 42-43.

To decide this case we need not settle the uncertainty concerning our obligation to credit allegations of the cause of existing injuries since, unlike *Simons* and *Warth*, where the plaintiffs had already suffered an alleged injury-in-fact which they attempted to attribute to the official action in question, the alleged injury here is itself purely prospective—the petitioner makes no claim that the ICC's exemption has hurt any union member yet. We must therefore reject any of the petitioner's allegations that we determine to be overly speculative. Moreover, we note that any petitioner alleging only future injuries confronts a significantly more rigorous burden to establish standing. Although "[t]he fact that harm or injury may occur in the future is not necessarily fatal to a claim of standing[,] . . . [it can] lessen the concreteness of the controversy and thus mitigate [sic] against a recognition of standing." *Harrington v. Bush*, 553 F.2d 190, 208 (D.C. Cir. 1977). When a litigant alleges only future injury, he "must demonstrate a realistic danger of sustaining a direct injury . . ." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). This petitioner's allegation does not even approach this rigorous standard.

The only allegation of injury that we can discern from the petitioner's brief is that railroad workers "stand to be hurt" by the "unauthorized control and manipulation of carriers" and by "the financial wrecking of rail carriers" that will supposedly result from the exemption for interlocking directorates. Although not explicitly set forth, we can surmise that petitioner is asserting that the ICC's new rule will lead to the creation of at least one interlocking directorate that would not have been created but for the exemption from § 11322(a); that one of those additional interlocking directorates will result in some anticompetitive behavior or a railroad bankruptcy that would not have occurred but for the interlocking directorate; and that a member of the United Transportation Union will thereby suffer an injury. We believe that this chain of allegations—no link of which is of the type that we must "accept as true"—is fatally speculative and therefore does not suffice to confer standing.

In the first place, we see no reason—*and the petitioner offers us none*—to credit the proposition that an interlocking directorate involving a class II or class III railroad will damage, let alone lead to the "financial ruin" of, a carrier.[10] If this allegation is aimed at the likelihood that an officer or director will act *contrary* to the interests of one of the carriers on whose board he sits, it is not just speculative, it is rather far-fetched. To assume that an officer or director will subvert his own firm or drive it into bankruptcy, even if he also has an interest in another carrier, requires us to assume unrealistically that a single officer or director has either the incentive or the power to destroy his own railroad. In addition, crediting this allegation also forces us to presume illegal activities on the part of the individual acting as an executive for more than one railroad. Any director that would, as petitioner fears, purposely steer one carrier into bankruptcy to bolster the competitive position of another or even sacrifice the interests of one of the carriers for the benefit of the other would almost certainly violate his fiduciary duties to the shareholders of the damaged carrier.[11] Indeed, even if an officer or director had a strong incentive to destroy his own firm, it is preposterous to assume that any corporation—who would surely be aware of the executive's other affiliation—would retain (or hire in the first place) an officer or director who had such an incentive, let alone allow that person to attack the firm from within.

---

[10]Notwithstanding the suggestion of our concurring colleague, *see* Concurring Opinion at 1, this proposition is no more coextensive with the merits of this case than the question of injury-in-fact ever is. To decide the merits, we would have to determine whether the ICC acted arbitrarily and capriciously or contrary to law in adopting the challenged exemption, quite apart from whether that exemption could be thought ultimately to harm railroad workers. We therefore do not agree that the merits and standing questions "are resolved by the same inquiry." *See id.* at 2.

[11]We note also that the ICC retains the power to revoke any interlocking directorate that appears to threaten any such extraordinary consequences, *see* 49 U.S.C. § 10505(d).

If the petitioner instead is alleging that workers will be injured because of possible anticompetitive collusion of carriers whose directorates are interlocked (which is the classic purpose of prophylactic measures such as § 11322(a)), we think that claim inadequate, primarily because it is wholly speculative whether decreased competition in the railroad industry will harm rather than help UTU members. Theoretically, the ultimate effect of reduced competition on railroad workers—as distinguished from shippers—is indeterminate. Reduced competition is often associated with decreased output, which could translate into fewer job opportunities and/or lower wages for employees. On the other hand, carriers facing less competitive pressure from other carriers will also face less pressure to cut their costs, including labor costs. *See Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 539 (1983) ("a union's primary goal is to enhance the earnings and improve the working conditions of its membership; that goal is not necessarily served, and indeed may actually be harmed, by uninhibited competition among employers striving to reduce costs in order to obtain a competitive advantage over rivals.") (footnote omitted); *Adams v. Pan American World Airways, Inc.*, 828 F.2d 24, 27 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1109 (1988). This indeterminacy is enough to defeat petitioner's standing to claim that the exemption will harm union members by reducing competition—especially when it is considered alongside the other speculative aspects of the chain of allegations.

Even if petitioner could pass over the above hurdles, we would also have to assume that the hypothetical interlocking directorate that facilitated the injurious behavior would not have been formed but for the rule removing the prior approval requirements of § 11322(a). Since the ICC has not rejected any application for the types of interlocking directorates covered by the rule in nearly twenty years, the prior approval procedure seems to have been primarily a nuisance—discouraging applications, if at all, on the basis of bother or expense. While it is possible that

the exemption will result in a greater number of interlocking directorates, we see no reason to believe that any links formed after the ICC's new rule are more likely to be mere subterfuges for collusive behavior than were the interlocking directorates formed under the old regime. Thus, even if a railroad with a newly formed interlocking directorate was sabotaged thereby, or if it engaged in collusion, the exemption challenged here might not even constitute "but for" causation. Not only might the interlocking directorate have been approved even without the ICC's blanket exemption from § 11322(a), but whatever hypothetical harm that resulted might have occurred even without the interlocking directorate.

Any one of the factors discussed above might be enough to place the petitioner's allegation in the category of "unadorned speculation," *Simon*, 426 U.S. at 44, and therefore to deny standing; taken together, petitioner's claim of injury seems but a shadow in the mist. It fails all three prongs of the standing inquiry: it is highly unlikely that the petitioner will sustain any injury at all; even if an injury were sustained, it is unlikely that it could be fairly traced to the ICC's exemption from the prior approval provisions of § 11322(a); and, since any hypothetical future injury could also occur even in the absence of the challenged ICC rule, a favorable decision from this court would not be "likely" to redress it, *see Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979). *Cf. Center for Auto Safety v. Thomas*, 847 F.2d 843, 882 (D.C. Cir. 1988) (*en banc*) (opinion of Silberman, J.) (noting that the injury in fact and causation inquiries often run together when the alleged injury is uncertain to occur at all).[12]

---

[12]To be sure, this circuit has allowed labor interests to sue where their alleged injuries have been far from certain, but those decisions are readily distinguishable from this one. In *International Union of Bricklayers v. Meese*, 761 F.2d 798 (D.C. Cir. 1985), for example, we found standing for a labor union to challenge INS practices which, they alleged, improperly allowed aliens into the United States who would then perform work that

It is suggested nevertheless that the petitioner's allegation must be credited for Article III purposes because Congress, in passing § 11322(a), expressed its belief that interlocking directorates would lead to the financial ruin of rail carriers.[13] We are thus again confronted with an issue that this court has pondered in several recent cases but never definitively settled: what, if any, are the implications for Article III standing purposes of a congressional view of the likely effect of legislation? *See Public Citizen v. FTC*, 869 F.2d 1541, 1549-50 & n.16 (D.C. Cir. 1989); *Dellums v. Nuclear Regulatory Comm'n*, 863 F.2d 968, 978-79 (D.C. Cir. 1988); *id.* at 984 (Ruth B. Ginsburg, J., dissenting as to standing).

Decisions about Article III standing are decisions about the constitutional boundaries of the federal judicial power. While Congress indisputably may preclude the federal courts from hearing cases that they would be constitutionally permitted to hear, the Congress surely cannot expand the constitutional jurisdiction of the federal courts—in

---

would otherwise have gone to union members. Although the union sought declarative and injunctive relief to prevent future injury, it was able to point to specific instances where union members had allegedly already been displaced by the INS practice at issue. Accepting the union's factual allegations as true, as it was bound to do, the court found that the alleged injury was not speculative, noting that " '[p]ast wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury,' . . . [and therefore that] the prospect of injury sometime in the reasonably foreseeable future seems fairly probable." *Id.* at 803 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974)). Compared to the petitioner's allegation here, the union's alleged injury in *Bricklayers* was "positively imminent." *See Center for Auto Safety v. NHTSA*, 793 F.2d 1322, 1341 (D.C. Cir. 1986) (Scalia, J., dissenting). There is no evidence or even an allegation here that any interlocking directorate in the railroad industry is currently harming or has ever harmed any railroad worker.

[13]That Congress may also have been concerned about anticompetitive behavior is irrelevant; as we have previously discussed, *see supra* at 10-11, that possible consequence does not give standing to the UTU as it might shippers.

essence, amend the Constitution—merely by legislating. *See Dellums*, 863 F.2d at 978. Rather, the courts must resist expansion of their own constitutional boundaries and reject any congressional orders or suggestions that would take them beyond the strictures of Article III. As such, in analyzing Article III standing problems, we cannot be *bound* by Congress' predictions or intentions as to the likely effect of legislation.[14]

That is not to suggest, of course, that courts should pay no attention to Congress' predictions of the effect of legislation. "[A]s a matter of comity, it is unseemly for a federal court to ignore such legislative opinion." *Dellums*, 863 F.2d at 978. But in assessing legislative judgments, courts should bear in mind that when Congress predicts that an injury is caused by a certain behavior or phenomenon and when it predicts the likely impact of legislation, it performs a task that is quite different from both the "fairly traceable" and "redressability" portions of the Article III standing inquiry. Congress need not meet constitutional, or any other, causation standards before exercising legislative power. *See Dellums*, 863 F.2d at 979. When Congress considers a bill that would restrict interlocking directorates between railroads, members or a committee may assert that interlocking directorates between railroads cause bankruptcies and facilitate collusion, but

---

[14]Neither *Public Citizen v. F.T.C.*, 869 F.2d 1541 (D.C. Cir. 1989) nor *National Wildlife Federation v. Hodel*, 839 F.2d 694 (D.C. Cir. 1988) is to the contrary. In both of those cases, the court was apparently convinced by the congressional findings that it "credited." *See Public Citizen*, 869 F.2d at 1549 ("[Congress'] determination is consistent with our own understanding of the benefits of repeated warnings: only constant reminders of the health dangers associated with smokeless tobacco will effectively offset the persuasive power of the industry's advertisements promoting its use."); *Hodel*, 839 F.2d at 708-09 ("And while Congress cannot create standing on its own, it can provide legislative assessments which courts *can* credit in making standing determinations. . . . Congress' suggestion here . . . is just such a legislative assessment.") (emphasis added and citations omitted). Thus, neither case stands for the proposition that courts *must* defer to congressional findings when assessing a party's Article III standing.

there is no constitutional requirement that such predictions of causation be correct, or even likely, for Congress to legislate in reliance on them. Even if there is only one chance in 1000 that a problem Congress is addressing can be traced to a particular cause, Congress, as an exercise of legislative judgment, may decide to pass a law that is based on that possibility. A court's causation inquiry is much more rigorous; before a court can constitutionally adjudicate a claim that relies on the allegation that future interlocking directorates will injure UTU members, it must determine that the causal nexus is firm. Otherwise, it misuses judicial power. Similarly, Congress' analysis of the effectiveness of its product in remedying a perceived ill is necessarily less confined than a court's redressability inquiry. Unlike a court, Congress is not "constitutionally obliged to demonstrate that its exercise of legislative power will have a foreseeable proximate effect on any specific individual" or group of individuals. *See Dellums*, 863 F.2d at 979. Even if a proposed bill has but one chance in 1000 of solving or even mitigating a certain problem, Congress is free to enact it. As we noted in *Dellums*, "Congress may and does pass legislation that seeks only approximately or imprecisely . . . to affect the behavior of men and nations." *Id.* Our concurring colleague—who criticizes our standing analysis without offering her own—therefore mixes apples and oranges when she suggests that we should apply the same "rational basis" standard that we use to measure congressional adherence to constitutional limits on *its* power when we judge "congressional determinations that bear on standing . . . ." Concurring Opinion at 2. We are in no sense reviewing Congress' standing determination because Congress did not, by legislating, make one. As we have explained, Congress is not obliged constitutionally to ensure that its power is used only to decide "cases and controversies." Therefore, an explicit or implicit legislative prediction which induces congressional action is never and can never be "reviewed" by the judiciary when the latter decides a standing issue.

In light of those analytical differences, it is a difficult question whether we owe any deference to congressional predictions or assessments of cause and effect when we analyze a standing problem. Various members of this court have expressed different views on this subject. *See, e.g., Public Citizen v. FTC*, 869 F.2d 1541, 1549-50 & n.16 (D.C. Cir. 1989) (noting the "propriety" of judicial deference to congressional judgments of cause and effect relationships but stressing that deference "does not mean blind obedience"); *Dellums v. Nuclear Regulatory Comm'n*, 863 F.2d 968, 978-79 (D.C. Cir. 1988) (observing that "we have never as a court held that we are bound to accept a congressional appraisal of the effect of its product. Indeed, to do so would be to permit Congress, by legislation, to amend the Constitution."); *id.* at 984 (Ruth B. Ginsburg, J., dissenting as to standing) ("[w]hen the redressability inquiry involves a question of predictive fact regarding matters outside the realm of judicial expertise, . . . courts should be reluctant to contradict the judgment of Congress, doing so only upon a showing that Congress' judgment does not stand the test of rationality."). We need not finally settle this dispute to decide the case before us since, even under the formulation that is most deferential to Congress—that we should defer to a rational congressional assessment—we should not defer here. Although the original congressional assessment of the impact of interlocking directorates on railroads may well have been a rational *legislative* judgment when it was made in 1914, it is too far out of date to serve as a basis for petitioner's standing.

The legislative history of the interlocking directorate provision, 49 U.S.C. § 11322(a) contains a few statements that arguably support the proposition that interlocking directorates may lead to railroad bankruptcies. First, a report submitted by the House Committee on Interstate and Foreign Commerce in May of 1914 stated that:

> Whether the necessity for this provision is so great as represented or not, and whether the anticipated benefits are exaggerated or not, there is a *general*

> *impression* that most of the wreck and ruin of railroads and consequent damage to public service nd the public interest has been due to the machinations of men who managed different corporations and by the policies adopted for the different corporations constituting a system or about to be consolidated into a system wrought ruin to some or all of the carriers involved.

H. R. REP. No. 681, 63d Cong., 2d Sess. 3 (1914), *reprinted in* 51 CONG. REC. 9598 (June 1, 1914) (emphasis added). In addition, there were three brief statements made during floor debates in the House in June of 1914 that asserted, in a conclusory fashion, that interlocking directorates were evil, the source of collusion, and an incentive for executives to sacrifice the interests of one carrier to those of another.[15]

---

[15]Congressman Rayburn stated that:

> the interlocking of directorates of great corporations of this country has been one of the greatest of the evil tendencies of the times. . . . It is as natural for a man who controls these corporations to work for the interest of the one in which he has the greatest pecuniary interest as it is for water to flow downhill.

51 CONG. REC. 9688 (June 2, 1914). Two days later, Congressman Aswell opined that:

> It is greatly to be doubted if any single cause has contributed more to business corruption than the modern corporate business procedure of interlocking directorates. It is shown by a recent congressional report that . . . one man . . . was a director at one time in 67 great companies, at least one-half of them being railroad companies and one of them being the greatest industrial enterprise in the Nation, which sold its products to those same railroads, and at the same time he was fiscal agent for the railroad companies—thus he was fiscal agent, buyer, and seller at one and the same time.

51 CONG. REC. 9814 (June 4, 1914). Finally, Congressman Barkley commented that:

> One of the great evils of this generation . . . has been the fact that the same men have been and are officers and directors

Assuming therefore that Congress' 1914 assessment as to the possible causal connections between interlocking directorates and railroad failures was rational as a legislative appraisal, and further assuming that a legislative appraisal of possible causation is entitled to deference when analyzing the causal element of standing, it would not be rational for us as a court to rely upon Congress' assessment in this case. To do so would ignore the fact that this assessment was made 75 years ago about a transportation industry in which railroads held a far more dominant market share than they do today. Moreover, we simply cannot disregard a record showing that interlocking directorates among railroads were formed virtually at will over the past 40 years, despite § 11322(a), with absolutely no evidence of any railroad failure resulting therefrom. In these circumstances—leaving aside the question of whether or when we are ever obliged to defer to congressional assertions of cause and effect relationships—it would be irrational to defer to Congress' 1914 pronouncements about the dangers of interlocking directorates among railroads in order to credit the allegation made by the petitioner here.

III.

One final issue merits discussion. In comments submitted to the ICC opposing the proposed rule, petitioner

---

> in many corporations which ought to be competing companies, but which ... are bound together by unnatural and unholy ties. We seek to change that condition in this bill with reference to railroads ...

51 CONG. REC. 9828 (June 4, 1914).

These statements were actually made in 1914, when the provision at issue here, § 11322(a), first passed the House, but that provision did not pass the Senate in 1914 and indeed was not enacted until Congress passed the Transportation Act in 1920. The legislative history of the Transportation Act of 1920, consisting of weeks of debate in both houses, filling hundreds of pages in the Congressional Record, contains no substantive discussion of the interlocking directorate problem or the expected effect of § 11322(a).

stated that, "[t]he Commission's present procedure [requiring prior approval] is quite simple. Moreover, there is developed a public record as to the relationships, which better enables public protection." And petitioner states in its brief to this court that: "The non-filing of a notice that the interlocking directorate exemption is being invoked requires UTU to seek review of the class exemption to prevent injury prior to a specific exercise of the exemption, since changed directors affect rail operations." While we are somewhat puzzled as to what this means, even read generously to allege a procedural injury—that it will be more difficult for the union to challenge interlocking directorates in the future because it will not have prior notice of them—we do not think that it confers standing on the petitioner since it bears no plausible nexus to a "substantive" injury.

It is beyond dispute that the federal courts may entertain suits alleging procedural injuries. *See, e.g., McGarry v. Secretary of the Treasury,* 853 F.2d 981, 984-85 (D.C. Cir. 1988) (finding standing for a union challenging the failure of IRS to follow statutory procedure guaranteeing the union's right to comment on a waiver of minimum payments to a benefit plan); *National Wildlife Federation v. Hodel,* 839 F.2d 694, 712 (D.C. Cir. 1988) (standing based on losing the statutory right to have an environmental impact statement prepared that could be used to evaluate and oppose future mining operations). But before we find standing in procedural injury cases, we must ensure that there is some connection between the alleged procedural injury and a substantive injury that would otherwise confer Article III standing. *See, e.g., McGarry,* 853 F.2d at 984-85 ("[I]n a claim such as that which appellants bring here, procedural and substantive stakes are inextricably intertwined.... In bringing this action for access to the application, appellants are not seeking to vindicate a procedural right *in vacuo.*") (citation omitted). Without such a nexus, the procedural injury doctrine could swallow Article III standing requirements. Consider, for example, what would happen if the ICC adopted a rule

stating that any American could intervene in an ICC proceeding to challenge any interlocking directorate between two railroads, and then later repealed that rule. Would every American be entitled to sue alleging that he or she suffered a procedural injury when the right to intervene was revoked? Surely some showing that interlocking directorates would be likely to injure the complainant should be required. Indeed, if a procedural injury alone suffices to confer Article III standing, any American could sue any agency alleging that it is arbitrary and capricious not to have a procedure by which they can challenge agency action.

Given the utter speculativeness of the petitioner's allegation of substantive injury, any allegation of procedural injury fails as well. The procedural injury arguably alleged here is as tenuously connected to a potential substantive injury as the allegation we found overly speculative in *Dimond v. District of Columbia*, 792 F.2d 179 (D.C. Cir. 1986). In *Dimond*, we held that a plaintiff challenging the constitutionality of the District of Columbia no-fault insurance law lacked standing to claim that the District of Columbia Council—by failing to read the bill twice in substantially the same form prior to enactment—violated the D.C. statute stating the procedural rules for passing a bill. Even though we had ruled that the plaintiff had alleged sufficient injury in fact—his inability to sue under the no-fault insurance bill—we found no plausible link between the alleged procedural irregularity and the plaintiff's alleged injury since there was no reason to believe that the bill would have been substantially different even if the Council had followed its established procedures. Similarly here, since we do not believe that there is any likelihood that interlocking directorates will harm railroad workers, we see no reason to allow petitioner to sue on a theory that the ICC's exemption has made it marginally more difficult for the union to challenge interlocking directorates in the future.

We therefore dismiss the petition for review.

GINSBURG, RUTH B., *Circuit Judge, concurring in denying the petition for review*: This is a case in which standing and merits merge. It is best resolved, I believe, by the simple point my colleagues make "[i]n the first place": the petitioner has shown no cause "to credit the proposition that an interlocking directorate involving a class II or class III railroad will damage, let alone lead to the 'financial ruin' of, a carrier." Ct. Op. at 11. A case so slim seems to me an inappropriate one in which to rehearse at length, albeit again without resolving for this circuit, the large "question whether we owe any deference to congressional predictions or assessments of cause and effect when we analyze a standing problem." *Id.* at 17. I write separately, therefore, to disassociate myself from the court's extended essay.

I.

As the court's opinion tellingly demonstrates, standing in this case indeed depends totally on the merits of the claim that the challenged exemption will open the way for "the financial wrecking of rail carriers," and thereby hurt railroad workers. *Id.* at 10. *But cf. Warth v. Seldin*, 422 U.S. 490, 500 (1975) (standing "in no way depends on the merits"). That claim, as the Interstate Commerce Commission cogently explained, is insubstantial. The Commission was mindful of the small market share held by class II and class III railroads. *See* Ct. Op. at 4 n.5. It relied on forty years' experience to conclude that an exemption not expanded to cover interlocks between class I railroads would advance the welfare of the railroad industry consonant with the deregulatory thrust of the Staggers Act. In short, the Commission sensibly exercised the discretion Congress entrusted to it.

A reviewing court, after finding the Commission's decision entirely reasonable, might say, as my colleagues do, that the injury petitioner asserts is imaginary, so petitioner has no standing. There is respectable authority, however, for pretermitting the difficult justiciability issue

when, as in this case, the questions of standing and merits blend, and the merits are decidedly against the complainant. *See, e.g., Secretary of the Navy v. Avrech*, 418 U.S. 676, 677-78 (1974); *Chandler v. Judicial Council*, 398 U.S. 74, 89 (1970); *United States v. Augenblick*, 393 U.S. 348, 351-52 (1969); *Lorion v. Nuclear Regulatory Comm'n*, 785 F.2d 1038, 1041 (D.C. Cir. 1986); *National Wildlife Fed'n v. United States*, 626 F.2d 917, 924-26 & n.16 (D.C. Cir. 1980) (McGowan, J.); *Adams v. Vance*, 570 F.2d 950, 954 n.7 (D.C. Cir. 1977) (per curiam); *Chinese Am. Civic Council v. Attorney General*, 566 F.2d 321, 325 & n.9 (D.C. Cir. 1977) (MacKinnon, J.); *Marker v. Schultz*, 485 F.2d 1003, 1004 (D.C. Cir. 1973) (Leventhal, J.). I would follow that path here, in the interest of economy, restraint, and the avoidance of unnecessary constitutional confrontations. *Compare Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567, 578 (D.C. Cir. 1975) (en banc) (McGowan, J.), *cert. denied*, 424 U.S. 933 (1976) ("In declining to decide the question of justiciability, we note its close relationship to the question we do decide, that is to say, the merits of the constitutional claim.... We agree that ... we cannot say [that defendants' conduct] offends the Constitution. What we decline to do, however, is to take the more drastic step of holding that we would never be competent to reach a contrary conclusion.") (footnote omitted), *with id.* at 596 (court should not have avoided justiciability issue) (Tamm and Robb, JJ., concurring in the result); *id.* at 605 (same) (Wilkey and Danaher, JJ., concurring in the result). When standing and merits are resolved by the same inquiry, why not so recognize candidly? In such instances, does the label really matter?

II.

The court suggests, although it ultimately does not hold, that we should treat congressional determinations that bear on standing differently from other legislative policy judgments. I resist the suggestion, and would apply to standing analysis, as to merits matters, the general axiom that legislative judgments on social and economic

issues enjoy a strong presumption of constitutionality. When no "fundamental right" or class attracting heightened scrutiny is affected, Supreme Court jurisprudence for a half century or more has cautioned judges to defer to economic and social prescriptions, proscriptions, and predictions by elected representatives, so long as one can posit a rational basis for the legislative determination. *See, e.g., Ferguson v. Skrupa,* 372 U.S. 726 (1963); *Williamson v. Lee Optical,* 348 U.S. 483 (1955); *United States v. Carolene Prod. Co.,* 304 U.S. 144 (1938).

My colleagues imply that we should subject legislative judgments relevant to standing to a far more stringent brand of judicial review. They observe that "Congress surely cannot expand the constitutional jurisdiction of the federal courts — in essence, amend the Constitution — merely by legislating." *See* Ct. Op. at 14-15. But deference to rational congressional predictions no more charters Congress to amend article III than deference to the legislators' rational policy judgments allows Congress to amend substantive constitutional constraints on its authority. The courts can and do exercise a check. The issue is whether courts start their inquiry with an initial bias in favor of the disposition of a co-equal branch, or whether they owe "[no] deference to congressional predictions," Ct. Op. at 17, and therefore must be "convinced" that the legislature's judgment is not only reasonable, but right. *See* Ct. Op. at 15 n.14.

By so brigading article III, effectively exalting it over other constitutional constraints on legislative action, the court is led to posit a broad category of measures that the Constitution permits Congress to place in the charge of administrators, but prohibits judges from monitoring; the court describes these measures as ones that only "approximately or imprecisely . . . affect the behavior of men." *Id.* at 16 (internal quotation omitted). In this domain, it is apparently the court's vision that executive

officers and commissions reign supreme, unchecked by the safeguard of judicial review.*

I agree that courts are not "*bound* by Congress' predictions or intentions as to the likely effect of legislation." Ct. Op. at 15. Congressional economic and social judgments bearing on standing merit not rubber stamps, but respect, to the extent those judgments stand the test of rationality we apply to substantive legislative enactments. *See Dellums v. Nuclear Regulatory Comm'n*, 863 F.2d 968, 984 (D.C. Cir. 1988) (Ruth B. Ginsburg, J., dissenting as to standing). Circuit precedent is largely in accord. *See Public Citizen v. F.T.C.*, 869 F.2d 1541, 1549 & n.16 (D.C. Cir. 1989); *Center for Auto Safety v. Thomas*, 847 F.2d 843, 855-56 & n.15 (D.C. Cir. 1988) (Wald, C.J.); *National Wildlife Fed'n v. Hodel*, 839 F.2d 694, 708 (D.C. Cir. 1988); *Center for Auto Safety v. NHTSA*, 793 F.2d 1322, 1334-35 (D.C. Cir. 1986); *Autolog Corp. v. Regan*, 731 F.2d 25, 31 (D.C. Cir. 1984); *International Ladies' Garment Workers' Union v. Donovan* [*ILGWU*], 722 F.2d 795, 811-12 (D.C. Cir. 1983), *cert. denied sub nom. Breen v. ILGWU*, 469 U.S. 820 (1984); *Animal Welfare Institute v. Kreps*, 561 F.2d 1002, 1010 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

Conclusion

This easy case did not require us to air "a difficult question." *See* Ct. Op. at 17. Underscoring that the court eventually reserves decision of the weighty issue to another day and more appropriate case, and satisfied that the Commission acted rationally, not arbitrarily, I concur in denying the petition for review.

---

*So positioning executive officers is in tension with the precept that ordinarily no man (or body of men) should ultimately judge his own cause. *Cf.* THE FEDERALIST No. 10, at 58 (J. Madison) (Ford ed. 1898); *see also* In re Sealed Case, 838 F.2d 476, 527 & n.26 (D.C. Cir.) (Ruth B. Ginsburg, J., dissenting), *rev'd sub nom.* Morrison v. Olson, 108 S. Ct. 2597 (1988).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1773 **September Term, 1989**

United Transportation Union,
Petitioner

v.

Interstate Commerce Commission
and United States of America,
Respondents

Association of American Railroads,
Intervenor

United States Court of Appeals
For the District of
Columbia Circuit

FILED NOV 28 1989

CONSTANCE L. DUPRE
Clerk

PETITION FOR REVIEW OF AN ORDER OF THE INTERSTATE COMMERCE COMMISSION

BEFORE: Ruth B. Ginsburg, Silberman and D.H. Ginsburg, Circuit Judges

JUDGMENT

This cause came on to be heard on the petition for review of an order of the Interstate Commerce Commission and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the peti-

tion for review is dismissed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:

/s/
CONSTANCE L. DUPRE, CLERK

Date: November 28, 1989

Opinion for the Court filed by Circuit Judge Silberman.

Opinion concurring in denial of the petition for review filed by Circuit Judge Ruth B. Ginsburg.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1773 **September Term, 1989**

Patrick W. Simmons
Petitioner

v.

Interstate Commerce Commission
and United States of America,
Respondents

Association of American Railroads,
Intervenor

BEFORE: Ruth B. Ginsburg, Silberman and D.H. Ginsburg, Circuit Judges

ORDER

Upon consideration of Petitioner's Petition for Rehearing filed January 12, 1990, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/
Robert A. Bonner
Deputy Clerk

APPENDIX D

Served October 4, 1988

INTERSTATE COMMERCE COMMISSION REPORTS

Ex Parte No. 474

EXEMPTION FROM 49 U.S.C. 11322(a) FOR CERTAIN INTERLOCKING DIRECTORATES

Decided: September 19, 1988

The Commission adopts final rules exempting from regulation as a class requests to assume the position of officer or director of one carrier, while holding the position of officer or director of another carrier, except where both carriers are class I railroads.

DECISION

BY THE COMMISSION:

On April 14, 1988 (53 Fed. Reg. 12443) we published a Notice of Proposed Rulemaking (NPR) to exempt from regulation as a class those requests filed for authority under 49 U.S.C. § 11322(a) or individual exemption under 49 U.S.C. § 10505 to assume positions as officer or director of one carrier, while holding the position of officer or director of another carrier, except where both carriers are class I railroads.

Four comments were filed. Comments in support of the proposal were filed separately by the Association of American Railroads (AAR), The American Short Line Railroad Association (ASLRA) and Sergeant W. Wise, counsel for several

shortline railroads in Western New York. Comments opposing the exemption were filed by Patrick W. Simmons, Illinois Legislative Director for the United Transportation Union (Simmons).

As discussed below, we will adopt the proposed exemption. The new rules are set forth in the appendix.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C.§ 11322(a), Commission approval is required before a person may hold the position of officer or director of more than one rail carrier. As we noted in our earlier decision, the provision was enacted as part of the Transportation Act of 1920 [Ch. 91, § 439, 41 Stat. 496 (1920)], to protect public and private interests by preventing the operation of one carrier for the benefit of another, which in the past had been found in particular instances to result in a lessening of competition and unfair competitive advantage. *Boyd Application Under* § 20a(12), 333 I.C.C. 815 (1968).

In the early years following the enactment of the interlocking directorate provision, the Commission adopted a strict and narrow interpretation of the prior approval requirements. While the Commission approved a few interlocking directorates involving relatively small rail carriers [see e.g. In re Gray, 224 I.C.C. 632 (1938); and *In re Ingersoll*, 224 I.C.C. 515 (1938)], it denied the majority of interlocking directorate applications presented to it during the 1930's and 1940's. *See* the cases cited by both Simmons and AAR, including *Chesapeake and Ohio Railway Company Purchase*, 271 I.C.C. 5 (1948); *In re Boatner*, 257 I.C.C. 369 (1944); *In re Coverdale*, 244 I.C.C. 567 (1941), *aff'd on rehearing*, 252 I.C.C. 672 (1942); *In re Astor*, 193 I.C.C. 528 (1933); and *In re Rand* 175 I.C.C. 587 (1931). In these decisions, the Commission construed

§ 11322(a) to impose on the applicant the burden of making an "affirmative showing" that the interlocking arrangement would not harm public or private interests, and that "special circumstances" warranted an exception to the general prohibition of interlocking officers and directors.

Simmons characterizes the interlocking directorate provision as supplementary to the Clayton Antitrust Act's comparable provisions—except that the Commission is to police the situations where rail carriers are involved.[1] Simmons cites *Chesapeake and Ohio Railway Company Purchase, supra,* decided in 1948, for the proposition that the Commission has a five-point test for approval of interlocking directorates under 49 U.S.C. § 11322. This test was based on the above-cited cases decided in the 1930's and 1940's and included the following points (1) a showing of the absence of competition between the carriers; (2) a showing that, even in the absence of direct competition between the two carriers to be commonly directed, neither carrier has the ability to elect between the common-directed carrier and another carrier at an interchange point; (3) a showing that there are no existing or prospective conflicts of interests; (4) a showing that the interlocking position will neither interfere with the independence of the carriers, nor effectuate control or management in a common interest; and (5) a showing that special circumstances require the otherwise prohibited interlocking directorate.

---

[1]As we noted in footnote 1 in our prior decision, the interlocking directorate provision that first appeared in an amended bill passed by the House in 1914 was under consideration by the House at the same time that the House was considering two other bills which became the Clayton Antitrust Act and the Federal Trade Commission Act. The Clayton Antitrust Act made it unlawful for any person to simultaneously be a director of two or more corporations, where one of the corporations had a net worth exceeding $1 million, but it expressly exempted carriers.

AAR characterizes the Commission's early regulation of interlocking directorates simlarly. However, AAR notes that, since the time Congress enacted restrictions against interlocking directorates, both the approach of the Congress and the Commission towards transportation regulation has changed dramatically. In the Staggers Rail Act of 1980, (Staggers Rail Act), Pub. L. No. 96-448, 94 Stat. 1895 (1980), Congress mandated that the railroad industry be allowed to operate as other industries, except where government regulation was shown to be necessary. Since its passage, AAR points out that the Commission has generally approved interlocking directorates as a routine matter, either through the approval of applications under § 11322(a) or through the exercise of its exemption authority under § 10505. Finally, neither AAR nor any other party advocates expanding the proposed exemption to include interlocking directorates where both carriers are class I railroads.

The Staggers Act substantially broadened our authority to exempt transactions from regulation. Under 49 U.S.C. § 10505, we must exempt a person, class of persons, or a transaction or service when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101a; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power. We can exempt not only a single transaction, but an entire class of transactions, as here. *See, e.g., Railroad Consolidation Procedures*, 363 I.C.C. 200, 202-203 (1980).[2] Congress clearly

[2]The Commission has already exercised its exemption authority to grant class exemptions relating to interlocking directorates. In *Exemption of Certain Designated Operators From § 11343*, 361 I.C.C. 379 (1979), *aff'd in part and remanded in part sub nom. McGinness v. ICC* 662 F.2d 853 (D.C. Cir. 1981), the Commission exempted from § 11322 officers and directors of companies operating exclusively as Designated Operators under legislation providing for continued rail service on rail lines of bankrupt

intended that we grant exemptions and rely on "after the fact" remedies, including revocation of the exemption to correct any abuses of market power.[3] We affirm and adopt the analysis set forth in our prior decision proposing this exemption, as expanded by our discussion here.

Prior to discussing how our proposal meets the exemption criteria, we will address several matters of general relevance to this proceeding. First, in our prior decision we stated that interested persons could submit comments on expanding the proposed class exemption to include interlocking directorates involving two or more class I carriers. Only AAR filed comments on this. No party advocates this suggestion, and there have been few, if any, requests in recent years for authorization of interlocking directorates involving class I carriers. Accordingly, we will not expand the class exemption at this time to include interlocking directorates linking class I rail carriers.

Second, Simmons has objected to our adoption of the class exemption since there was no public petition for the institution of this proceeding. A public petition or request is not a prerequisite for our taking this action. Rather, under 49 U.S.C. § 10505, we are ***required*** to grant partial or complete exemptions when the requisite findings concerning the national transportation policy, limited scope and/or abuse of market power have been found. The Commission is "charged with

---

railroads not included in the Conrail system. Similarly, in 1970 the Commission adopted regulations exempting from the prior approval requirement of § 11322(a) interlocking officers and directors of carriers lawfully operated under common control or management pursuant to Commission approval. *Revised Regulations Governing Interlocking Officers*, 336 I.C..C. 679 (1970) (presently codified at 49 C.F.R. 1185.9). The Commission subsequently amended these regulations in 1979 to provide that the prior approval requirements are also inapplicable to interlocking directorates of carriers whose common control or management has been exempted by the Commission pursuant to § 10505. *See* 44 Fed. Reg. 75386 (1979).

[3]H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. at 105 (1980).

the responsibility of *actively pursuing exemptions* for the transportation and services that comply with the section's standards" (emphasis added).[4] The Commission is further charged with removing *"as many as possible* of the Commission's restrictions ***" (emphasis added).[5] The exemption provision thus represents a strong Congressional mandate for the Commisison to grant exemption from regulation where such exemption, as here, is warranted under statutory criteria. As discussed below, the proposed exemption meets all of the statutory criteria under § 10505. Thus, our action in instituting this proceeding is consistent with, and in furtherance of , our statutory mandate.

Finally, concurring with the dissent of Commissioner Simmons in our prior decision, commentator Simmons argues that the Commission's present procedure is quite simple and therefore should be retained. Simmons also adds that, under the present procedure, a public record is developed as to the relationships of those involved which better enables public protection. AAR counters that, while the present procedures may be relatively simple, there is an unnecessary delay associated with the need to obtain a formal Commission decision. It notes that the exemption of officers and directors, particularly in the case of publicly held companies, often takes place in circumstances that require prompt action.

We agree with AAR. The delay inherent in Commission approval of an interlocking directorate under present procedures complicates the proxy solicitation process, may raise concerns about compliance with the disclosure obligations of federal securities laws, and, ultimately, may threaten the nomination or election of an officer or director candidate who is otherwise qualified and competent to serve. Thus, while the cur-

---

[4]H.R. Rep. No. 1035, 96th Cong., 2d Sess. 60 (1980).

[5]H.R. Rep. No. 1430, 96th Cong., 2d Sess. at 105 (1980).

rent procedures may not be complex, they continue to impose burdensome processing requirements with attendant delay on the parties and the Commission. Our exemption will remove these burdens and, as discussed *infra*, is entirely consistent with the statutory criteria of § 10505. Furthermore, given the remaining protections for the public, also discussed *infra*, we fail to see any meaningful reason for retaining the current procedures other than where two or more class I carriers are involved. Accordingly, we will now turn our discussion of the statutory criteria for granting an exemption under § 10505.

1. *Continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101a.*

As we stated in our prior decision, applications filed under 49 U.S.C. § 11322(a) and requests for individual exemptions from that provision are rarely, if ever, opposed and are typically granted.[6] Our experience in analyzing these requests on a

[6]AAR notes that the current interpretation of § 11322(a) and its prior approval requirement is reflected in the fact that the Commission has not disapproved a proposed interlocking arrangement between railroads in a reported decision for almost 20 years, and has denied only one such interlocking arrangement in almost 40 years.

Recent applications for authority to hold an interlocking directorship have been granted in Finance Docket No. 23440 (Sub-No. 1), *Application of Robert E. L. deButts Under 49 U.S.C. §11322* (not printed), served November 2, 1987; and Finance Docket No. 27157 (Sub-No. 1), *In the Matter of the Application of Robert E. McNair Under 49 U.S.C. § 11322* (not printed), served October 9, 1987.

Recent petitions for individual exemptions have been granted in Finance Docket No. 31145, *Mort Lowenthal—Exemption From 49 U.S.C. § 11322* (not printed), served December 8, 1987; Finance Docket No. 31133, *In the Matter of the Petition of Gordon H. Fay — Exemption From 49 U.S.C. § 11322* (not printed), served November 2, 1987; Finance Docket No. 31060, *Thomas C. Graham—Exemption From 49 U.S.C. § 11322* (not printed), served October 2, 1987; and Finance Docket No. 31099, *R. Lawrence McCaffrey, Jr.—Exemption From 49 U.S.C. § 11322* (not printed), served September 24, 1987).

case-by-case basis shows that such requests are consistent with the rail transportation policy of 49 U.S.C. § 10101a. In particular, we have found that these exemptions minimize the need for federal regulatory control and expedite regulatory decisions [59 U.S.C. § 10101a(2)]; ensure continuation of a sound rail system [49 U.S.C. § 10101a(4)]; foster sound economic conditions in transportation [49 U.S.C. § 10101a(5)]; and encourage honest and efficient management [49 U.S.C. § 10101a(10)]. Furthermore, we have found that other aspects of the rail transportation policy are not affected adversely by these exemptions.

AAR cites these same transportation goals as goals that would be furthered by the proposed exemption, and adds that exemption would also reduce regulatory barriers to entry into and exit from the rail industry [§ 10101a(7)]. Simmons charges that the proposed exemption would be highly anticompetitive. Simmons claims that our analysis in proposing the class exemption has not dealt adequately with the range of problems that can occur, such as interlocking arrangements with rail equipment lessors, interlocking arrangements resulting from carrier applications as opposed to applications filed by individuals, and situations where an individual acts as counsel, part owner, and director of an interlocking series of short-line spin-offs by major rail carriers. However, in each of the cases cited in support by Simmons[7] where approval was sought for an interlocking directorate, we found that the proposed transaction was not anti-competitive and we approved the application or the exemption. These individual approvals were not contested or later challenged.

ASLRA points out that, since the passage of the Staggers Act, over 180 new railroads have been formed, and with one

[7]See footnote 8, *infra*.

exception, all are class II and III carriers. Many of these class II and III railroads are providing service to shippers that would have otherwise lost service by the abandoning class I railroad. This would be in furtherance of the goals set forth at 49 U.S.C. §10101a(7). ASLRA contends that, for the new carriers to succeed, it is not unusual for them to obtain vital skills or specialties by recruiting talented personnel from those already employed by other carriers who are able to fill both roles. And, as AAR notes, in some instances lenders providing necessary financing for the acquisition and operation of the rail lines specifically request the inclusion of experienced railroad managers on the short-line railroad's board of directors. As such, shippers and the public are not threatened by dual directors, but rather, are benefited by rail carriers that are able to secure experienced and talented managers.

As discussed in our prior decision, the standard of approval under § 11322 is whether private or public interests will be adversely affected. There is simply no reason to believe private interests will be harmed where carriers themselves desire a certain individual's services as an officer or director.

Existing relationships between carriers are typically not affected by interlocking directorates. As we stated in our previous decision, the reasons behind the 1920 enactment of the interlocking directorate prior approval provisions are no longer valid especially where, as here, exemption is not being expanded to cover class I railroads. Given the relative smallness in size of class II and class III railroads and the overall competition present in the transportation industry, the impact of such linkage would be insubstantial, and it would be highly unlikely for any linkage to succeed in allowing one carrier to dominate or influence the other carrier contrary to the other rail carrier's or shipper's interests. Moreover, other statutory restraints (set forth *infra*) remain, as well as our revocation

authority, to deal with any truly unusual transaction involving an interlocking directorate that is anticompetitive or otherwise adversely affects the national transportation policy.

Even assuming that an interlocking directorate may result in the domination of one class II or class III carrier by another carrier, other federal and state law remedies exist to address such collusive activities. In addition to federal antitrust laws, the Commission has continuing authority to review a transaction or to revoke an exemption upon request, in whole or in part, in any individual case. 49 U.S.C. § 10505(d). *See also* 49 U.S.C. § 11343-45 which prohibit the acquiring of common control over two or more carriers without first obtaining Commission approval. Besides having the threat of revocation of the exemption, an interlocking director or officer who failed to act in the best interersts of the railroad would be violating his or her fiduciary duties and would be personally liable to the company and to the shareholders for such conduct. Thus, requirement of § 11322(a) is not necessary to prevent public or private interests or competition from being adversely affected.

Our proposed exemption will also further the rail transportation policy by eliminating unnecessary federal regulation and accompanying administrative delay, and unnecessary personal and industry expenses in preparing and filing the application or petition. It will also further the policy by removal of a regulatory barrier to a rail carrier or its corporate parent from obtaining individuals it believes are best qualified to serve as officers or directors. Conversely, exemption will not have an adverse effect on any of the goals of § 10101a, although it may be "neutral" on some of the goals (e.g. energy consummation). Thus, we conclude that continued regulation is not necessary to carry out the rail transportation policy.

2. *The exemption is of limited scope.*

AAR points out that the proposed class exemption would apply only to the procedural prior-approval requirements of § 11322(a), and that the proposal excludes interlocking directorates linking Class I rail carriers. AAR further stresses that the important substantive provisions of § 11322(b) prohibiting certain actions by interlocking officers or directors will remain intact, thus enabling the Commission to regulate transactions and dealings between carriers which share a common officer or director. For these reasons, AAR argues that the proposal is limited in scope.

Simmons suggests that, if the proposal is adopted, the Commission and the public will not have the facts available to determine the true scope of the transaction. In support, Simmons points to prior cases involving, *inter alia*, an interlock that also included a major rail equipment lessor, one where a carrier sought an exemption for an individual, and one where interlocking directorates were formed from a series of short-line spin-offs by major rail carriers. Simmons argues that we have failed to consider problems such as these in making our proposal.

Simmons' concerns are unfounded. We have considered these matters. In all the cases cited by Simmons involving allegedly unusual instances where prior approval for an interlocking directorate was sought,[8] we found the transaction

[8]See, e.g., Finance Docket No. 31133, *In the Matter of Gordon H. Fay—Exemption—49 U.S.C. §11322 supra*, where the interlock also included a major rail equipment lessor; Finance Docket No. 30526, *Iowa Northern Railway Company—Exemption—§11322* (not printed), served July 29, 1984, where a carrier sought exemption for two individuals; and Finance Docket No. 30520 *John D. Heffner—Exemption From 49 U.S.C. § 11322* (not printed), served August 27, 1984, where the interlocking directorate according to Simmons arose as part of a series of short-line spin-offs by major rail carriers. Simmons also cites Finance Docket No. 31145, *Mort Lowenthal—Exemption From 49 U.S.C. § 11322, supra;* Finance Docket

to be limited in scope and authorized the interlock.[9] Indeed, the Commission has even exercised its exemption authority to permit an officer of a class I carrier to serve as a director in a non-carrier controlling a short-line carrier. *See* Finance Docket No. 30633, *Application of William S. Cook Under 49 U.S.C. § 11322* (not printed), served April 12, 1985; and Finance Docket No. 23440 (Sub-No. 1), *Application of Robert E. L. DeButts Under 49 U.S.C. § 11322, supra*. Moreover, our decision not to expand the exemption at this time to include class I carrier interlocks reflects a sensitivity to the issue Simmons raises. We find overall that the exemption as crafted is of limited scope.

3. *Regulation is not needed to protect shippers from abuse of market power.*

Based on the above findings regarding the rail transportation policy, we also conclude that regulation is not required to protect shippers from market abuse. As we have discussed, we find no meaningful potential for the exercise of combined market power contrary to the public interest. The fact that no shippers chose to file comments in this proceeding further supports this conclusion.

Labor Protection. Labor protection is not provided under

No. 31099, *R. Lawrence McCaffrey, Jr.—Exemption 49 U.S.C. 11322, supra;* and Finance Docket No. 30891, *Paducah & Louisville Railway, Inc.—Acquisition and Operation Exemption—Illinois Central Gulf Railroad Company* (not printed), served May 11, 1987, where a proceeding was instituted further to develop the record regarding a notice of exemption by a noncarrier for the acquisition and operation of a line of railroad.

[9]Even assuming *arguendo* that a proposal was not limited in scope, the standard for exemption from regulation is either a finding of limited scope or that regulation is not necessary to protect shippers from an abuse of market power, where continued regulation is not necessary to carry out the rail transportation policy (emphasis added).

§ 11322 either as a mandatory or discretionary matter, and will not be imposed here.

Accordingly, we adopt the proposal and 49 CFR § 1185 is revised to include the exemption of certain interlocking directorates as set forth in the appendix.

This action is taken under the authority of 49 US.C. § 10321, § 11322, and § 10505; and 5 U.S.C. § 553 and § 559.

We find:

1. Regulation under 49 U.S.C. § 11322(a) requiring prior approval for an individual who seeks the position of officer or director of one rail carrier while holding the position of officer or director of another rail carrier, except where both carriers are class I railroads, is not necessary to carry out the rail transportation policy, is limited in scope, and is not necessary to protect shippers from the abuse of market power.

2. We affirm our prior certification that this section will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. It imposes no new reporting or other requirements directly or indirectly on small entities. The exemption instead will reduce delay and regulatory burden. The exemption will also have a positive impact on small carriers since it will remove a regulatory barrier to qualified individuals becoming directors of those entities.

This action will not significantly affect either the quality of the human environment or energy conservation.

COMMISSIONER LAMBOLEY, dissenting in part:

I would not extend this class exemption to include interlocking directorates between and involving Class I and Class II or III carriers. In my view, there is no business justification

in this record or in Commission experience to warrant such exemption of Class I carrier participation in Class II or III operations. Indeed, questionable "tie-in" arrangements evident in certain short line transactions[1] strongly suggest there are sound public policy and competitive reasons for not doing so at the corporate board level.

COMMISSIONER SIMMONS, dissenting:

Nothing in the comments filed in this proceeding has changed the views stated in my dissent to the NPR. I submit that the present procedures not only are simple but also can be quite expeditious when individual situations or petitions are time-sensitive. Again, I believe the Commission's existing oversight of interlocking directorates serves an important public purpose while imposing a minimal burden on the industry.

It is ordered:

1. We adopt the proposed rules and revise Part 1185 of Title 49 of the Code of Federal Regulations as set forth in the appendix to this decision.

2. This decision is effective November 4, 1988.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Simmons, Lamboley and Phillips. Commissioner Lamboley dissented in part with a separate expression. Commissioner Simmons dissented with a separate expression.

---

[1]See, e.g., Finance Docket No. 30915, *Otter Tail Valley R. Co.—Acq. & Optn Exemption—Burlington Northern, supra*, Docket No. AB-1 (Sub-No. 177), *Chicago & North Western Transp. Co.—Abandonment and Discontinuance of Service in Fond Du Lac Co., WI* (not printed), served July 29, Finance Docket No. 31089, *Montana Rail Link, Inc.—Exemption Acq. & Optn Certain Lines of Burlington Northern Railroad Co.*, decision served May 26, 1988, separate expression served July 22, 1988.

APPENDIX

Title 49, Subtitle B, Chapter X, Part 1185 of the Code of Federal Regulations is revised as follows:

Part 1185—INTERLOCKING OFFICERS

1. The authority citation for 49 C.F.R. Part 1185 is revised to read as follows:

Authority: 49 U.S.C. 10321, 11322 and 10505; 5 U.S.C. 553 and 559.

2. Sections 1185.1.-1185.10 are redesignated as §§ 1185.2-1185.11 respectively.

3. A new § 1185.1 is added to read as follows:

§ 1185.1 *Scope of exemption.*

(a) Subject to the exception in paragraph (c) of this section, "interlocking directorates," as defined in paragraph (b) of this section, are exempt from the prior approval requirements of 49 U.S.C. 11322(a).

(b) An "interlocking directorate" exists whenever an individual holds the position of officer (as defined in § 1185.3) or director of one carrier and assumes the position of officer or director of another carrier.

(c) The exemption in paragraph (a) of this section does not apply to those interlocking directorates sought where the individual is already an officer or a director of a class I railroad and seeks to become an officer or director of

another class I railroad. An application under 49 U.S.C. § 11322(a) or a petition for exemption under 49 U.S.C. 10505 for authority for this type of interlocking arrangment must be filed.

(d) This exemption does not affect the competitive bidding requirements of Section 10 of the Clayton Act (15 U.S.C. 20), as implemented in part by 49 C.F.R. Part 1010.

4. Newly redesignated § 1185.3 is revised to read as follows:

§ 1185.3 *Application of regulations.*

The regulations in this part apply to any person authorized by or undertaking for each of two or more class I rail carriers to perform the duties, or any of the duties, ordinarily performed by a director, president, vice president, secretary, treasurer, general counsel, general solicitor, general attorney, comptroller, general auditor, general manager, freight traffic manager, passenger traffic manager, chief engineer, general superintendent, general land and tax agent, or chief purchasing agent of a carrier.

* * * * *

APPENDIX E

Served April 13, 1988

INTERSTATE COMMERCE COMMISSION

DECISION

Ex Parte No. 474

EXEMPTION FROM 49 U.S.C. 11322(a) FOR CERTAIN INTERLOCKING DIRECTORATES

Decided: April 7, 1988

We here propose to exempt from regulation as a class those requests filed for authority under 49 U.S.C. 11322(a) or individual exemption under 49 U.S.C. 10505 to assume the position of officer or director of one carrier, while holding the position of officer or director of another carrier, except where both carriers are class I railroads.

BACKGROUND

Under 49 U.S.C. 11322(a), Commission approval is required before a person may hold the position of officer or director of more than one rail carrier. The provision was enacted as part of the Transportation Act of 1920 to protect public and private interests by preventing the operation of one carrier for the benefit of another, which in the past had been found in particular instances to result in a lessening of competition and unfair competitive advantage. *Boyd Application Under Section 20a(12)*, 333 I.C.C. 815 (1968).[1]

[1]The provision first appeared in an amended bill passed by the House in 1914—H.R. 16586, 63d Congress, 2nd Session. That bill was under consideration by the House at the same time that it was considering two other bills which became the Clayton Antitrust Act and the Federal Trade Commission Act. The provision was included in H.R. 16586 and eventually became part of the Transportation Act of 1920 because of the failure of the House Judiciary Committee to deal with the directorates of railroad companies. The Clayton Act made it unlawful for any person to be a director of two or more corporations at the same time, where one of the corporations has a net worth of more than $1,000,000, but it expressly exempted common carriers.

Since the Congress enacted the restriction against interlocking directorates, its approach towards transportation regulation has changed dramatically. The Congress, in the Staggers Rail Act of 1980, Pub. L. No. 94-448, mandated that the railroad industry be allowed to operate as other industries, except where government regulation was shown to be necessary.

The Staggers Act substantially broadened our authority to exempt transactions from regulation. Under 49 U.S.C. 10505, we must exempt a person, class of persons, or a transaction or service when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necesary to protect shippers from the abuse of market power. We can exempt not only a single transaction, but an entire class of transactions, as we propose here. *See, e.g., Railroad Consolidation Procedures,* 363 I.C.C. 200, 202-203 (1980).

Our review of interlocking directorate regulation has been prompted by the recent proliferation of short line railroads, especially those created by non-transportation companies to serve primarily their own traffic. In connection with the start-up of these new lines, the new operators often obtain additional railroad industry expertise by their choice of officers and directors. These individuals may be holding similar positions on other carriers. Thus, regulatory authorization is required.

PROPOSED EXEMPTION

We preliminarily find that our continued regulation of the majority of interlocking directorates involving railroads is not necessary to carry out the national rail transportation policy. We propose to exempt from regulation under 49 U.S.C.

11322(a) all interlocking directorates involving railroads, except those interlocking directorates that link two or more class I railroads.

Recent applications filed under 49 U.S.C. 11322(a) and requets for individual exemptions from that provision typically have been granted.[2] Our experience in analyzing these requests on a case-by-case basis has shown that such requests are consistent with the rail transportation policy of 49 U.S.C. 10101a. In particular, we have found that these exemptions minimize the need for federal regulatory control and expedite regulatory decisions (49 U.S.C. 10101a(2)); ensure continuation of a sound rail system (49 U.S.C. 10101a(4)); foster sound economic conditions in transportation (49 U.S.C. 10101a(5)); and encourage honest and efficient management (49 U.S.C. 10101a(10)). We have found further that other aspects of the rail transportation policy are not affected adversely by these exemptions.

The same findings regarding the effect on the rail transportation policy appear to be warranted here. Our proposed exemption would appear to further the rail transportation policy

---

[2]Recent applications for authority to hold an interlocking directorship have been granted in Finance Docket No. 23440 (Sub-No. 1), *Application of Robert E. L. DeButts Under 49 U.S.C. 11322* (not printed), served November 2, 1987; and Finance Docket No. 27157 (Sub-No. 1), *In the Matter of the Application of Robert E. McNair Under 49 U.S.C. 11322* (not printed), served October 9, 1987.

Recent petitions for individual exemptions have been granted in Finance Docket No. 31145, *Mort Lowenthal — Exemption from 49 U.S.C. 11322* (not printed), served December 8, 1987; Finance Docket No. 31133, *In the Matter of the Petition of Gordon H. Fay — Exemption From 49 U.S.C. 11322* (not printed), served November 2, 1987; Finance Docket No. 31060, *Thomas C. Graham — Exemption From 49 U.S.C. 11322* (not printed), served october 2, 1987; and Finance Docket No. 31099, *R. Lawrence McCaffrey, Jr. — Exemption From 49 U.S.C. 11322* (not printed), served September 24, 1987.

(RTP) by eliminating unnecessary federal regulation and accompanying administrative delay, and unnecessary personal and industry expenses in preparing and filing the application or petition. It would also further the policy by removal of a regulatory barrier to a rail carrier or its corporate parent from obtaining individuals it believes are best qualified to serve as officers or directors. Conversely, exemption would not appear to have an adverse effect on any of the goals of section 10101a.

The standard of approval under section 11322 is whether private or public interests will be adversely affected. There is no reason to believe private interests will be harmed where carriers themselve desire a certain individual's services as an officer or director. Existing relationships between carriers typically are not affected, and overall, we find no meaningful potential for the exercise of combined market power contrary to the public interest. We, therefore, tentatively conclude that the simultaneous holding by the selected individual of the position of officer or director of one carrier and the position of officer or director of another carrier does not appear necessary to further the RTP.

Moreover, we think that the reasons behind the 1920 enactment of the interlocking directorate prior approval provision no longer appear to be valid, given the restrictions we intend to impose on the class exemption here. Today, it would be highly unlikely for any linkage with a class II or III carrier to succeed in using interlocking officers or directors as a device: (1) for one carrier to dominate or influence the other carrier contrary to that rail carrier's interests and its shippers; interests; and (2) for unlawfully operating the two putatively independent carriers in concert, to the detriment of shippers and connecting carriers. Besides having the threat of revocation of the exemption, an interlocking director who failed to

act in the best interests of the railroad would be violating his or her fiduciary duties and would be personally liable to the company and to shareholders for such conduct. Also, there are other substantial provisions designed to regulate transactions and dealing between carriers sharing a common officer or director. Sections 11343-45 would still prohibit the acquiring of common control over two or more carriers without first obtaining Commission approval. Collusive activity, to a certain extent, is also subject to review under the federal antitrust laws, and, if so, could be effectively remedied under those laws.[3] In any event, class II and III carriers even in concert with a class I carrier would not appear to be able effectively to exert combined market power in most instances, given their smallness in size and the overall competition present in the transportation industry. Prior approval requirements would not necessarily guard against these practices.

By proposing a class exemption that excludes interlocking directorships between class I railroads, we narrow even further the unlikely event that the class exemption would result in such conduct, but rather it will be limited in scope and there should be no need for continued regulation to protect shippers from abuse of market power.

Finally, we note that granting a class exemption for these transactions would not affect our ability to review a transaction (or to revoke an exemption) upon request (*e.g.*, upon allegations of an anticompetitive result). 49 U.S.C. 10505(d).

As noted above, we are not proposing that the class exemption apply to those individuals seeking interlocking direc-

---

[3]Section 10 of the Clayton Act provides that certain transactions (having an annual value in excess of $50,000) between carriers with interlocking officers and directors must comply with rigorous competitive-bidding requirements established by Commission regulation. *See* 49 CFR 1010.

torships where both carriers are class I railroads. Applications under 49 U.S.C. 11322(a) or exemption petitions under section 10505 would be required to be filed for an individual to assume the position of officer or director of one class I carrier while holding the position of officer or director of another class I carrier. However, interested persons may submit comments on expanding the class exemption to include interlocking directorates involving two or more class I carriers.

RELATED MATTERS

Labor Protection. Labor protection is not provided under section 11322 either as a mandatory or discretionary matter, and thus none will be imposed on these transactions, where exempt or otherwise.

Regulatory Flexibility Analysis. The Commission certifies that the proposed exemption, if promulgated, will not have a significant impact on a substantial number of small entities, because the proposal would merely remove prior approval requirements for individuals in certain circumstances to hold the position of officer or director of more than one carrier. The proposed exemption may have a positive impact on small carriers since it will remove a regulatory barrier to qualified individuals becoming directors of those entities.

Energy and Environment. This type of transaction does not have a significant environmental impact. *See* 49 CFR 1105.6(c)(2). Therefore, we conclude that this action will not significantly affect the quality of the human environment or conservation of energy resources.

If the proposed exemption is adopted, 49 CFR Part 1185 would be revised to include the exemption of certain interlocking directorates as set forth in the Appendix. We request comments on our proposal, as well as on expanding it to encom-

pass interlocking directorates involving two or more class I railroads.

Authority: 49 U.S.C. 10321, 11322, and 10505; and 5 U.S.C. 553 and 559.

It is ordered:

1. Notice will be published in the *Federal Register* on April 14, 1988.

2. An original and 10 copies of comments must be filed within 30 days after *Federal Register* publication.

3. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley, Commissioner Simmons dissented with a separate expression.

Noreta R. McGee
Secretary

(SEAL)

COMMISSIONER SIMMONS, dissenting:

I do not view the possible evils of interlocking directorates as lightly as the majority. The filing of petitions for exemption and our examination of them on a case by case basis require a minimum of effort on the part of the petitioners as well as the Commission. Given this fact, I would maintain the Commission's present oversight procedures as a relatively simple and painless method of protecting public and private interests from any possibility of untoward conduct by common officers or directors.

APPENDIX

Title 49, Subtitle B, Chapter X, Part 1185 of the Code of Federal Regulations is proposed to be revised as follows:

Part 1185 - INTERLOCKING OFFICERS

1. The authority citation for 49 CFR Part 1185 would be revised to read as follows:

   Authority: 49 U.S.C. 10321, 11322, and 10505; 5 U.S.C. 553 and 559.

2. Part 1185 would be redesignated as follows: §§ 1185.1 - .10 redesignated as §§ 1185.2 - .11 respectively.

3. Section 1185.1 would be added to read as follows:

   § 1185.1 *Scope of exemption*

   (a) Subject to the exception in paragraph (c) of this section, "interlocking directorates," as defined in subsection (b) below, are exempt from the prior approval requirements of 49 U.S.C. 11322(a).

   (b) An "interlocking directorate" exists whenever and individual holds the position of officer (as defined in § 1185.3) or director of one carrier and assumes the position of officer or director of another carrier.

   (c) The exemption in paragraph (a) of this section does not apply to those interlocking directorates sought where the carriers are class I railroads. An application under 49 U.S.C. 11322(a) or a petition for exemption under 49 U.S.C. 10505 for authority for this type of interlocking arrangement must be filed.

(d) This exemption does not affect the competitive bidding requirements of Section 10 of the Clayton Act (15 U.S.C. 20), as implemented in part by 49 CFR Part 1010.

4. Newly redesigned § 1185.3 would be revised to read as follows:

§ 1185.3 *Application of regulations.*

The regulations in this part apply to any person authorized by or undertaking for each of two or more class I rail carriers to perform the duties, or any of the duties, ordinarily performed by a director, president, vice president, secretary, treasurer, general counsel, general solicitor, general attorney, comptroller, general auditor, general manager, freight traffic manager, passenger traffic manager, chief engineer, general superintendent, general land and tax agent, or chief purchasing agent of a carrier.

* * * * *